Nos. 18-1686/18-1711

In the United States Court of Appeals for the Sixth Circuit

AIRGAS USA, LLC,
Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner.

On Appeal from the National Labor Relations Board

REPLY BRIEF OF PETITIONER CROSS-RESPONDENT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUMMARY OF THE ARGUMENT

The Board attempts to characterize its Decision as straight-forward and amenable to well-settled case-law. But well-settled case law establishes that the Board carries the burden of persuasion to demonstrate a causal connection between an employee's protected activity and an employer's alleged unlawful motivation. The Board asserts that its inferred finding of unlawful motivation is "reasonable" but its inferred finding misapprehends facts and ignores contradictory record evidence. The Board discounts as pretext the employer's reasons for issuing a written warning to an employee who admitted to wrongdoing, but its finding of pretext is based on the same misapprehensions of record evidence that support its initial inference of unlawful motivation.

ARGUMENTS

I. The Board's Inferred Finding of Unlawful Motive Ignores Contradictory Evidence and Misapprehends the Record.

Although the Board, in the absence of direct evidence, is allowed to infer unlawful motive through substantial circumstantial evidence,[1] this does not "permit the Board to ignore relevant evidence that detracts from its findings."[2] When the Board does so, it invites scrutiny from this Court.[3] In its Brief, the Board rests its inference of bad motive on four findings.

First, the Board asserts suspicious timing. But the unresolvable contradiction in the Board's two timing arguments validate Board precedent holding that the "mere suspicion of unlawful motivation for the [discipline] is not sufficient to constitute substantial evidence that the discharges resulted from improper motives."[4] First, the Board

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[1] *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (Board may infer unlawful motivation from circumstances so long as substantial evidence substantiates the finding).
[2] *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6th Cir. 2013).
[3] *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001) (". . . this court must review evidence in the record that runs contrary to the Board's findings and conclusions.").
[4] *Neptco, Inc.*, 346 NLRB 18, 19-20 (2005).

argues that an inferred finding of unlawful motive is justified by the fact that Airgas issued Rottinghouse his written warning "only three weeks" after Rottinghouse and Luerhrman gave investigatory affidavits in another charge.[5] But a paragraph later, the Board argues the exact opposite when—in disputing Airgas's contention that it had long been continuously aware of Rottinhouse's serial charge-filing activities—it cites cases that speculate an employer "might wait" for a deferred future opportunity to discipline an employee for "pretextual" reasons.[6]

Second, the Board argues that Froslear's investigation implies bad motive. For example, the Board argues Froslear's behavior demonstrated bad motive when he left "the area" to get a camera instead of "seek[ing] out Rottinghouse or wait[ing] by the truck until Rottinghouse returned." No evidence in the record, however, indicates that normal Airgas procedures in such a situation require a manager to wait by a truck rather than secure documentary evidence of wrongdoing.[7] Indeed, the Board is correct when it assert that Rottinghouse was focused on "creating a record" of a serious safety

[5] NLRB Brief p. 27.
[6] Id. 28.
[7] Id. 28.

infraction.[8] As another example, the Board argues that Froslear's "evasive" interaction with Driver-Trainer McBride buttresses its finding of unlawful motive.[9] But to reach this finding, the ALJ and the Board had to ignore contradictory record evidence providing the context and meaning of this conversation.[10]

Third, the Board argues that its unlawful motive finding was supported by evidence that Froslear more severely disciplined Rottinhouse than other employees. But to make this argument that Board conflates the employer's disciplinary handling of minor incidents and more severe instances of wrongdoing in direct defiance of the substantial evidence on the record from multiple witnesses. Moreover, the Board purposely ignores contradictory record evidence that Edgar Reed was issued a written warning by the employer issued, which was subsequently reduced to a verbal warning as part of a post-disciplinary

[8] Id. 29
[9] Id. 29.
[10] Both Froslear and MacBride gave unctroverted testimony that the email correspondence, characterized by the Board as "evasive," was stilted because Froslear could tell that McBride did not "realize that this load is not going out for the first time, that it returned off the road. JA 4,;120-122.

negotiated grievance settlement. (App. 247).[11] Finally, when discussing the only other disciplinary action for the same work rules violation, the Board implies that rather than correcting violations of the same policy or work rules with the same level of disciplinary actions, employers wishing to defend themselves against discrimination allegations should instead measure the level of severity and subjectively apply differing levels of discipline.[12] This argument directly contradicts decades of Board and 6th Circuit precedent holding that the use of evidence of disparate treatment to infer unlawful motivation requires evidence that the disciplined employee was treated *more* severely compared to other employees with similar work records or offenses.[13]

Fourth, the Board argues that its finding of unlawful motive is supported by Froslear's supposedly shifting rationales. But rather than pointing to evidence of conflicting rationales, the Board simply points to multiple rationales. And each of these rationales is consistent with the

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[11] Reductions in disciplinary actions that result from the negotiated grievance procedure are not normally probative evidence of disparate treatment and animus. *See M & G Convoy, Inc.*, 287 NLRB 1140 (1988).
[12] NLRB Brief 33-34.
[13] *Borel Restaurant Corp. v. NLRB*, 676 F.2d 190, 192-193 (6th Cir.1982); *NLRB v. Supreme Bumpers, Inc.*, 648 F.2d 1076, 1077 (6th Cir.1981).

others. Multiple rationales do not prove conflicting rationales. This written was justified by the collective bargaining agreement, by the severity of the work rule violation, by the fact that Rottinghouse had just been issued another severe disciplinary action for another DOT work rule violation and by the employer's handling of past incident involving violation of the same work rule.

II. To Establish a Prima Facie Case Under *Wright Line* the General Counsel Must Prove by a Preponderance of the Evidence the Existence of a Causal Link Between an Employee's Protected Activity and the Employer's Decision to Discipline.

To establish a prima facie case under *Wright Line*,[14] the General Counsel must prove by a preponderance of the evidence not only that Airgas harbored animus against ULP-filing activity but also that Airgas's decision to issue a write-up to Rottinghouse was causally linked to his ULP-filing activity.[15] The burden of persuasion remains

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[14] *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1983) enf'd 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982).

[15] See National Labor Relations Act, 29 USC § 160 (Section 10(c) requires preponderance of the evidence); *Neptco, Inc.*, 346 NLRB 18, 19-20 (2005) ("A mere suspicion of unlawful motivation for the [discipline] is not sufficient to constitute substantial evidence that the discharges resulted from improper motives."); *Newcor, Inc.*, 351 NLRB 1034 fn. 4 (2007) (applying standard causation not generalized motive to Section 8(a)(4) cases); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002)

"always" with the General Counsel to prove the "ultimate question" of a determining causal link between the bad motive and the disciplinary decision.[16] Without such a causal link requirement, any employee could shield him or herself from disciplinary action through the serial and open filing of unfair labor practice charges with the Board. The Board's Decision demonstrates the danger in ignoring its own self-imposed limitation on replacing an employer's judgement with its own while not requiring the GC to establish a causal link.[17]

III. The Board Erred by Not Considering the Employer's Reason for Issuing the Written Warning to Rottinhouse.

In deciding Airgas was unlawfully motivated when it issued a written warning to Rottinhouse, the Board was not free to substitute its own its judgement for that of Airgas and decide what would have

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(burden remains with the GC to demonstrate causal connection through particularized showing after burden shift that Respondent "nonetheless" acted on the basis of unlawful animus).

[16] *NLRB v. Wright Line*, 662 F. 2d 899, 906-07 (1st Cir. 1981) *enforcing Wright Line,* 251 NLRB 1083 (1980)). *Accord, FiveCAP, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002) (burden remains with the GC to demonstrate causal connection through particularized showing after burden shift that employer "nonetheless" acted on the basis of unlawful animus).

[17] *See, e.g., Nat'l Express Corp.*, 341 NLRB 501, 502 (2004); *Simmons Co.*, 314 NLRB 717, 725 (1994) ("All that has been shown is a temporal connection and a suspicion that 'something is definitely going on.").

constituted appropriate discipline.[18] But the Board did exactly that when it first second-guessed Airgas's determination and then pressed that second-guess into double-duty first to infer bad motive and then again to dismiss its disciplinary rationale as pretext. Again, dismissing a valid rationale (supported by the CBA, DOT regulations, past disciplinary actions and the employee's own past wrongdoing) as a way to both infer animus as part of the prima facie analysis and then to dismiss without analysis the employer's justification under the Wright Line burden-shifting analysis speaks to the necessity of enforcing the required causal link requirement.

[18] *See, e.g., Nat'l Express Corp.*, 341 NLRB 501, 502 (2004).

CONCLUSION

Rottinghouse was disciplined because he broke a work rule and DOT regulations. He was not disciplined in retaliation for his charge-filing activities. Because the Employer issued the same level of discipline to Huff and Rottinghouse—the only two Cinday drivers to violate the work rule mandating the proper securing of cylinders—substantial evidence does not support a finding bad motive, a finding of pretext or a finding of a causal connection between Rottighouse's specific charge filing activity and Airgas's decision to discipline him. The Board's arguments to the contrary are based on misapprehensions of the record, disregard of evidence, flawed reasoning and misapplication of the law. For any of these several reasons, the Court should grant Airgas's petition for review and deny the Board's cross-application for enforcement of its order against Airgas.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 1617 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on the 31st day of October 2018, pursuant to 6 Cir. R. 25, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all parties indicated on the electronic filing receipt.

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